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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FABRIZIO BALESTRI, Plaintiff, vs. CIT GROUP, INC., STUDENT LOAN XPRESS, INC., AND DOES 1 THROUGH 30, INCLUSIVE, Defendants.	Case No. 08-CV-0846-JLS (JMA) **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

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Defendants CIT Group Inc. ("CIT"), and Student Loan Xpress ("SLX") (collectively, "Defendants") hereby respectfully oppose Plaintiff Fabrizio Balestri's ("Plaintiff") motion to remand.

INTRODUCTION

This breach of contract dispute is between Plaintiff, a highly compensated former executive, CIT (an undisputedly diverse defendant) and SLX, a Delaware corporation that had formally announced and begun the process of winding down its marketing and sales operations as of the filing of Plaintiff's complaint on April 11, 2008, but that was and continues to be an on-going concern with substantial assets that has its headquarters in New Jersey and its business operations in Ohio. Defendants timely exercised their statutory right to remove this matter to federal court based on diversity jurisdiction. *See* 28 U.S.C. §§ 1332, 1441. Plaintiff does not deny that the case satisfies the amount-in-controversy requirement. Plaintiff also does not deny that he is diverse with CIT, as Plaintiff is a citizen of California and CIT is a citizen of Delaware and New Jersey. Plaintiff's motion therefore rests solely on his contention that SLX maintains its principal place of business in California.

Plaintiff's motion must be denied. SLX never had its principle place of business in California. Indeed, as of April 11, 2008, SLX simply had no connection to California (except the completion of the process to close down its California operations). In any event, since June 2007, its principal place of business has been New Jersey.

As of May 2007, SLX was in the business of originating student loans. Its principal place of business was in Ohio. It marketed its business through student loan offices at colleges and universities throughout the United States and through the Internet. It did not maintain any retail locations in California or elsewhere. It maintained an office housing a sales force and call center in California, and a loan origination force in Ohio. In May 2007, SLX underwent a management change, which included the termination of Plaintiff's employment. Shortly thereafter, in June 2007, SLX moved its headquarters and its principal place of business to New Jersey, where the entire business was managed through and including April 11, 2008. On April 3, 2008, eight days before Plaintiff filed his complaint, SLX formally announced its decision that had been made during the preceding months to exit the loan origination business in light of changes to federal student loan regulations and instead to focus its attention on servicing its existing loans. As of April 11, 2008, SLX had ceased virtually all of its business operations in California, consolidating any remaining operations in New Jersey and Ohio. Thus, as of the time that Plaintiff filed his complaint in this case, SLX was headquartered in New Jersey and, since June 2007, had made all significant business and management decisions in New Jersey, and as of eight days earlier, had conducted operations only in New Jersey and Ohio and none in California. Thus, there simply is no support for Plaintiff's argument that, for purposes of diversity jurisdiction, SLX's principal place of business was in California.

Because the facts in the record are more than sufficient to establish by a preponderance of the evidence the existence of complete diversity among the parties and the requisite amount in controversy, the Court should deny Plaintiff's motion to remand.

FACTUAL BACKGROUND

In 2005, CIT acquired Educational Lending Group and its subsidiary Student Loan Xpress, Inc.[1] Declaration of Randall Chesler ("Chesler Decl."), attached as Exhibit A hereto, at ¶ 2. SLX became a wholly-owned subsidiary of CIT Group. *Id.* At the time of the acquisition, SLX was in the business of originating student loans, both through schools and directly to consumers. *Id.* at ¶ 3. It marketed its business through student loan offices at colleges and universities throughout the United States and through the Internet. *Id.* at ¶ 4. It did not maintain any retail locations in California or elsewhere. *Id.* It also maintained and continues to maintain offices in Ohio, in which the loans were opened and serviced. *Id.* Until May 2007, SLX was headed up by CEO Michael Shaut, who was based out of SLX's Cleveland, Ohio office. *Id.* at ¶ 5. SLX's sales force was primarily located in San Diego, California. *Id.* at ¶ 6. SLX also operated a call center in San Diego, California, through which school representatives and individual consumers could call a toll-free number for additional information or answers to their questions regarding SLX's loan products. *Id.* SLX, however, opened and serviced all of its loans out of its office in Cleveland, Ohio with the

[1] Educational Lending Group is also referred to herein as SLX.

assistance of its wholly-owned subsidiary, Xpress Loan Servicing, Inc. ("XLS"). *Id.* at ¶ 7. These functions included creating the loans, funding the loans, doing paperwork regarding the loans, and ultimately servicing the loans. *Id.* Until May 2007, XLS was also managed by CEO Michael Shaut. *Id.* SLX's financial department was and still is located in a third office in Cincinnati, Ohio. *Id.* at ¶ 8.

In the Spring of 2007, the New York Attorney General and the United States Senate announced investigations into student loan marketing practices, which were widely reported by the national press. Chesler Decl. at ¶ 8. Plaintiff was highlighted as a figure in the investigations. *Id.*; *see, e.g., "Senate Inquiry into Loan Case is Studying Stock Transfer,"* N.Y. TIMES (Apr. 11, 2007); *Senator Edward Kennedy,"Kennedy Student Loan Investigation Uncovers Additional Backroom Dealings"* (Apr. 11, 2007) (available at http://kennedy.senate.gov/newsroom). Shortly thereafter, in April and May 2007, there was a change in the senior management of SLX. SLX terminated the employment of CEO Michael Shaut in Cleveland, Ohio. *Id.* at ¶ 10. Its two other highest-ranking employees also ceased to be employed by SLX, as SLX terminated the employment of Plaintiff (which gives rise to this lawsuit), and another high-level employee's employment separated. *Id.* Both of those employees had worked out of SLX's San Diego, California office. *Id.* Following the management change, SLX transferred all senior management functions to Livingston, New Jersey and left none in SLX's San Diego office. *Id.* at ¶ 11. At that time, Randall Chesler became the company's acting president. *Id.* at ¶ 12. Chesler ran the company from his office in Livingston, New Jersey. *Id.* Chesler and other executives in New Jersey made all major decisions regarding SLX, including without limitation decisions about pricing, products, market positioning, staffing, and expenditures. *Id.* SLX employees in the other offices ultimately reported to Chesler in New Jersey. *Id.* While some SLX employees in the San Diego office retained executive titles, they did not act as decision-makers in the company and they also reported to Chesler in New Jersey. *Id.* at ¶ 13.

For some time following the change in executive management, SLX continued to market and sell loans out of its San Diego, California office and to open and service loans out of its Cleveland, Ohio office. *Id.* at ¶ 14. SLX also continued to operate its Cincinnati, Ohio office. *Id.*

However, the business drastically changed in late 2007. In October 2007, the United States Congress enacted legislative changes affecting the student loan industry. *Id.* at ¶ 15. Ultimately, in late 2007, Chelser and executives at CIT Group determined that these changes significantly reduced the profitability of the student loan origination business, at the same time that the business was becoming more costly. *Id*. At Chesler's direction, SLX began to exit certain lines of its student loan origination business in late 2007 and early 2008. *Id.* at ¶ 16. SLX also terminated its relationships with certain marketing partners and other entities with which it had contractual or other business relationships. *Id*. Similarly, SLX began to wind down the marketing and sales activities that it had previously carried out from its San Diego office, but remained active in the business of servicing previously opened loans. *Id*.

On April 3, 2008, eight days before Plaintiff filed his complaint, CIT CEO Jeffrey Peek announced that SLX would stop originating loans, stating in an email:

> Today we announced that we are closing our student lending origination business, Student Loan Xpress (SLX). This action enables us to concentrate on our core commercial franchises, redeploying resources to our higher-returning businesses as we look to operate a more focused organization.
>
> Recent legislative changes, which have significantly reduced the profitability of originating new business, and current credit market conditions have impacted many companies in the student lending business, and Student Loan Xpress is no exception. Even though we are no longer originating new student loans, we will continue to service existing student loans in our Cleveland service center with the same high quality of service our students and their families have come to expect.

Chesler Decl. at ¶ 17. SLX notified its remaining employees in San Diego that the office would be closing. *Id*. Mr. Peek also announced that the loan servicing operations would continue, which they do to this day in Ohio. *Id*.

From June 2007 through April 11, 2008, the date on which Plaintiff filed his complaint, all of SLX's corporate and management functions were performed in Livingston, New Jersey. Chesler Decl. at ¶ 18. Chesler and other executives in New Jersey made all key decisions regarding the ongoing transition of the business – including without limitation decisions regarding what functions would remain of the business, when changes would occur, and what employees would remain with the company. *Id.* The Human Resources, legal, accounting, and other corporate support departments also assisted in this process. *Id.*; *see also* Declaration of Karen Cifrese ("Cifrese Decl."), attached as Exhibit B hereto, at ¶ 2. During this time, management employees in the San Diego, California office were not making any independent decisions about the business or operations, as all such decisions were made by Chesler and others in New Jersey. Chelser Decl. at ¶ 19; *see also* Declaration of David Beach ("Beach Decl."), attached as Exhibit C hereto, at ¶¶ 3-4.

As of April 11, 2008, SLX was no longer marketing or selling student loan products out of its San Diego, California office or elsewhere. *Id.* at ¶ 20. Its business of servicing existing loans out of the Cleveland office and through XLS continues to this day. *Id.* SLX had already begun a process to move all of its call center functions from its San Diego office to its Cleveland office – a process that was ultimately completed in May 2008. *Id.* at ¶ 21. As of April 11, 2008, approximately 85 employees remained in SLX's California office. Cifrese Decl. at ¶ 3. Its two Ohio offices had approximately 65 employees in various business functions. *Id.* at ¶ 4. In addition, its wholly-owned subsidiary XLS had approximately 150 additional employees in Ohio. *Id.* at ¶ 5. SLX's San Diego office officially closed on June 9, 2008. Chesler Decl. at ¶ 22. Seven SLX employees in California were asked to stay employed with SLX to assist with the winding down of SLX's operations in California. Beach Decl. at ¶ 5.

As of April 11, 2008, SLX was and continues to be an on-going concern with substantial asserts. Chesler Decl. ¶ 23. Among those assets, it held and holds well in excess of a billion dollars in outstanding student loans and its wholly-owned subsidiary, XLS – all of which fall under Chesler's direct responsibility as acting president of SLX. *Id.*

PROCEDURAL BACKGROUND

On April 11, 2008, Plaintiff filed this action in San Diego County Superior Court. The first defendant was served on April 17, 2008. *See* Notice of Removal at § 2(d). On May 9, 2008, Defendants CIT and SLX timely removed this action on the basis of diversity jurisdiction. *Id.* at §§ 2-3. The notice of removal establishes, and Plaintiff does not deny, that the amount-in-controversy requirement is satisfied and that Plaintiff is a citizen of California. *Id.* at § 2(c); *cf.* Complaint at ¶ 24 (seeking wages of $1,675,000 and waiting time penalties of at least $137,671.23). The notice of removal also establishes, and Plaintiff does not deny, that Defendant CIT Group is a citizen of Delaware and New Jersey. *Id.* at § 2. The notice of removal also shows that Defendant SLX is a citizen of Delaware and New Jersey. *Id.*

STANDARD

At the time of removal, a defendant is "merely required to allege (not to prove) diversity . . . ." *Kanter v. Warner Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Though courts construe removal statutes strictly, in the event of a dispute about jurisdiction, a defendant merely needs to prove the requisite jurisdictional facts by a preponderance of the evidence. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992). Evidence offered in opposition to a motion to remand should be construed as an amendment to the notice of removal. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002). Once a defendant satisfies its burden to establish diversity jurisdiction, the district court may not remand the action. *See Brockman v. Merabank*, 40 F.3d 1013, 1017 (9th Cir. 1994).

It is well-settled that "the existence of complete diversity is assessed at the time of the filing of the complaint." *Strotek Corp. v. Air Transport Assn. of Am.*, 300 F.3d 1129, 1131 (9th Cir. 2002); *In re: Hawaii Federal Asbestos Cases*, 960 F.2d 806, 809-810 (9th Cir. 1992). The fact that a party may have had a different citizenship at some point prior the filing of the complaint does not affect the determination of jurisdiction. *Strotek Corp. v. Air Transport Assn. of Am.*, 300 F.3d 1129, 1131 (9th Cir. 2002) Similarly, subsequent changes in the citizenship of a party do not affect the determination of jurisdiction. *Hawaii Federal Asbestos Cases*, 960 F.2d at 809-10.

ARGUMENT

The evidence clearly demonstrates that, for purposes of diversity jurisdiction, SLX does not maintain its principal place of business in California. Plaintiff argues in favor of California based solely on allegations about SLX's operations *before* he was terminated in May 2007 – well before SLX began to move its business operations away from California. Even assuming for sake of argument that California was once SLX's principal place of business (which it was not), California certainly was not SLX's principal place of business when Plaintiff filed his complaint on April 11, 2008. Nor had it been for some time. The evidence squarely shows that SLX was conducting virtually no business or management functions in California at that time, and that as of ten months earlier, most of those functions had been moved to New Jersey or already resided in Ohio.

I. SLX's principal place of business is New Jersey.

A corporation is a citizen of the state where it is incorporated and where it maintains its principal place of business. 28 U.S.C. § 1332(c)(1). The Ninth Circuit determines principal place of business in two steps – first applying the "place of operations test," and then applying the "nerve center test." *Montrose Chem. Corp. v. Am. Motorists Ins. Co.*, 117 F.3d 1128, 1134 (9th Cir. 1997); *Breitman v. May Co. Cal.*, 37 F.3d 562, 564 (9th Cir. 1994). The "place of operations" focuses on where a "substantial predominance" of corporate activity occurs. *See Montrose Chem. Corp.*, 117 F.3d at 1128. If a company does not conduct a "substantial predominance" of activity in one state, the Ninth Circuit will then focus solely upon the "nerve center" test, which considers where executive and administrative functions occur. *See id.*

In this case, if SLX conducts a "substantial predominance" of business activity in any one state, that state is New Jersey. In no event can California be deemed the principal place of operations. If the principal place of operations test is indeterminate in this case, then the "nerve center" test applies. Under that test, the evidence unquestionably points to New Jersey as SLX's "nerve center" principal place of business.

A. SLX does not conduct a "substantial predominance" of business activity in California.

For Plaintiff to succeed under the "place of operations" test, the evidence must show that SLX conducts a "substantial predominance" of business activity in California. *Montrose Chem. Corp.*, 117 F.3d at 1134; *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092-93 (9th Cir.

1990). "Substantial predominance" means that the amount of SLX's business in California must be "significantly larger" than its business in Ohio or New Jersey. *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001). Courts in the Ninth Circuit have identified a number of factors relevant to the "place of operations" test, including: (1) the distribution of employees; (2) the source of production and sales activities; (3) the location of offices; (4) the location of the "home office" or headquarters; (5) where important business decisions are made; and (6) where day-to-day control of the company is exercised. *Montrose Chem. Corp.*, 117 F.3d at 1135; *Indus. Tectonics, Inc.*, 912 F.2d at 1091 & n.2, 1092, 1094; *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 776 (9th Cir. 1992). For purposes of applying the place of operations test, the first three factors above receive particular weight. *See id.* However, the remaining factors also are entitled to some weight. *Tosco*, 236 F.3d at 500-02.

In this case, the evidence shows that California does not account for a "substantial predominance" of activity with respect to *any* of the factors relevant to the "place of operations" test. Thus, the Court should apply the "nerve center" test, which as discussed below, fixes SLX's principal place of business in New Jersey.

1. Distribution of employees. As of April 11, 2008, SLX had approximately 85 employees in California and approximately 65 employees in Ohio. Cifrese Decl. at ¶¶ 3-4. This difference in the number of employees in California and Ohio would be inconsequential, in light of the relative sizes of the states' populations. *See, e.g., Arellano v. Home Depot U.S.A., Inc.*, 245 F. Supp. 2d 1102, 1107 & n.3 (S.D. Cal. 2003) (taking into account the "distorting effect" of California's size when assessing a company's principal place of business). Regardless, SLX's wholly-owned subsidiary XLS (which is an asset of SLX and is under the direct responsibility of SLX acting president Chesler) had approximately 150 additional employees in Ohio. *Id.* at ¶ 5; Chesler Decl. at ¶ 4. Thus, this factor strongly suggests that California is not SLX's principal place of business.

2. Location of production and sales activities. All "sales" of SLX's loans had occurred, not in physical retail locations in California, but rather in student loan offices throughout the country and over the Internet. Chesler Decl. at ¶ 4. In any event, as of April 11, 2008, SLX did not have any sales originating in California. *Id.* at ¶ 20. SLX had already begun the process of transferring all of its call center functions from its California office to one of its Ohio offices. *Id.* at ¶ 21. In his declaration, Plaintiff concedes that the call center "probably provides the most contact with the public of all of SLX' [sic] activities. *See* Balestri Decl. ¶ 7. This admission is significant in light of the Ninth Circuit's recognition that "the principal place of business should be where the corporation conducts the most activity that is visible and impacts the company." *See Montrose Chem. Corp.*, 117 F.3d at 1128, *quoting Industrial Tectonics*, 912 F.2d at 1094. Thus, SLX's transfer of its call center functions to Ohio weighs heavily in assessing SLX's principal place of business.

Moreover, from 2005 through April 2008, every loan that may have resulted from sales activity was processed and originated in Cleveland – not California – with the assistance of SLX's wholly-owned subsidiary XLS. Chesler Decl. at ¶ 7. Indeed, through April 2008, SLX was and continues to be an on-going concern with substantial assets. *Id.* at ¶ 23. Among those assets, it held and holds well in excess of a billion dollars in outstanding student loans, as well as its wholly-owned subsidiary XLS. *Id.* All such assets fall under the direct responsibility of Chesler as acting president of SLX. *Id.* Thus, as of April 11, 2008, SLX was akin to a holding company, which administered its assets and oversaw its subsidiary's business from Livingston, New Jersey. *See, e.g., Danjaq*, 979 F.2d at 776 (principal place of business of film development and production company was where decision-making and oversight occurred, and not where films were actually produced by its subsidiary); *see also Taber Partners, I, v. Merit Builders, Inc.*, 987 F.2d 57, 63 (1st Cir. 1993) (center of corporate activity and nerve center of a holding company are where the holding company holds and administers its assets). Thus, the evidence clearly shows that California had no "substantial predominance" over SLX's production and sales activities.[2]

3. Location of offices. SLX operated one office in California and two offices in Ohio. Chesler Decl. at ¶¶ 4, 14, 20-21 . Additionally, the executives managing and operating SLX were located in New Jersey. *Id.* at ¶¶ 11-13; 18-19. This factor therefore leaves California without a "substantial predominance" over SLX's place of operations.

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[2] Even assuming for sake of argument that a holding company's principal place of business is the location of the entity whose assets are being held (*see, e.g., Taber*, 987 F.2d at 64 n.9 (compiling cases)), SLX's principal place of business still would not be California, as XLS has no employee, offices or other ties to California. *See* Chesler Decl. at ¶¶ 4, 7, 17, 20.

4. Location of the "home office" or headquarters. Following the management changes at SLX in the Spring of 2007, SLX transferred all senior management functions to Livingston, New Jersey. Chesler Decl. at ¶ 11. Chesler then became SLX's acting president and ran the company from his office in New Jersey. *Id.* at ¶ 12. All of the other executives vested with responsibility for making important business decisions and setting policy for SLX also worked in New Jersey. *Id*. Moreover, all SLX employees in other offices ultimately reported to Chesler in New Jersey. *Id.* at ¶¶ 12-13. As such, New Jersey is SLX's home office or headquarters.

5. Where important business decisions are made. As of April 11, 2008, all important business decisions regarding SLX – including all decisions regarding the company's business practices, policies, public communications, and employees – were made by Chesler and other executives in Livingston, New Jersey. Chesler Decl. at ¶¶ 12, 18. The management employees in SLX's California office were not making any independent decisions about the business or operations. *Id.* at ¶¶ 13, 19; *see also* Beach Decl. at ¶¶ 3-4. Rather, all such decisions were brought to and made by Chesler and others in New Jersey. Chesler Decl. at ¶ 19. Moreover, no important executive or administrative functions were taking place in California. *Id.* at ¶¶ 18-19. This factor therefore favors New Jersey.

6. Where day-to-day control of the company is exercised. As of June 2007 through April 11, 2008, day-to-day control of SLX was exercised from New Jersey. Chesler Decl. at ¶¶ 11-13, 16-19. While the offices outside of New Jersey in Ohio and California may have exercised some minimal local control over business activities, no office (including the California office) enjoyed any substantial discretion or was authorized to make important decisions or set policy. *Id.* at ¶¶ 19. As such, this factor also clearly favors New Jersey.

7. Where employees ultimately report. All SLX employees outside of New Jersey, including all employees in California, ultimately reported to New Jersey. Chesler Decl. at ¶¶ 12-13. This factor therefore also favors New Jersey.

8. The location of administrative and financial offices. As of June 2007, all executive and management functions of SLX were located in Livingston, New Jersey. Chesler Decl. at ¶¶ 11-13, 16-19. The financial affairs of the company were handled in the Cincinnati, Ohio office, as well as in New Jersey. *Id.* at ¶¶ 8, 11-14, 18-19. As such, these factors favor New Jersey and Ohio.

As noted above, courts applying the "place of operations" test place relatively more weight on the first three factors of the test. Under these three factors, no single state emerges as the predominant location of SLX's business activities. If any state were to prevail on these factors, though, it certainly would not be California. The remaining factors strongly favor New Jersey as the principal place of business. In circumstances where no state is clearly the center of corporate activity, the Ninth Circuit has explained that courts should "assign greater importance to the corporate headquarters . . . ." *Indus. Tectonics, Inc.*, 912 F.2d at 1093; *see also Breitman*, 37 F.3d at 564. Thus, SLX has proven beyond a preponderance of the evidence that California is not its principal place of business under the "place of operations" test.

Notably, this case bears no resemblance to Ninth Circuit cases relied upon by Plaintiff. In those cases, the evidence clearly established that a significant majority of the company's business was based in California. *See, e.g., Tosco*, 236 F.3d at 501 (a significantly greater percentage of production and sales activities took place in California than in any other state); *Industrial Tectonics, Inc.*, 912 F.2d at 1092-94 (approximately 61% or more of relevant business activities occurred in California). In contrast, the evidence in the present case shows that virtually *all* of SLX's business had been moved away from California, and to other states, by the time that Plaintiff filed his Complaint in this case. As such, there is no rational basis on which the evidence could support a finding that SLX's business activities in California substantially predominate over its activities in any other state. The Court therefore should either conclude that California is not SLX's principal place of business under the "place of operations" test or, in the alternative, proceed to the "nerve center" test, in which case the outcome is the same.

B. SLX's "nerve center" is in New Jersey.

The "nerve center" test consists of a subset of factors considered under the "place of operations" test. *Montrose Chem. Corp.*, 117 F.3d at 1134; *Indus. Tectonics, Inc.*, 912 F.2d at 1092-93. Under this test, a company's principal place of business is the state in which its executive and administrative functions occur. *See id.* In this case, as discussed above, SLX's corporate headquarters was located in New Jersey, and virtually all of its executive and administrative functions occurred in New Jersey. *See supra* at Section I.A.4 through I.A.8. As such, the evidence overwhelmingly establishes that New Jersey was SLX's "nerve center." *Breitman*, 37 F.3d at 564.

II. Plaintiff's Motion is Based on Stale and Irrelevant Facts.

Plaintiff rests exclusively on stale and irrelevant facts in an effort to defeat diversity jurisdiction. In support of his motion, Plaintiff relies solely on his own declaration and a handful of unauthenticated documents attached as exhibits thereto. Plaintiff's factual allegations are outdated, as they necessarily relate to SLX's activities prior to June 2007 when Plaintiff was employed and would have had any personal knowledge as to the organization and operation of SLX – which is before SLX had completely replaced its high-level management and began to drastically change its business. Tellingly, Plaintiff does not even mention, much less address, the move of the SLX headquarters to New Jersey or the decision to transfer and shut down key portions of the student loan business in California. Thus, none of Plaintiff's arguments support remand.

Nor are Plaintiff's exhibits to his declaration of any consequence. Plaintiff first relies on Exhibit B to his declaration, which he asserts is an SLX marketing document. This undated document clearly is not current, as it does not accurately reflect SLX's business operations as of April 11, 2008. Beach Decl. at ¶ 6. As discussed above, SLX had approximately 85 employees in California at that time (not 146, as the document alleges). Cifrese Decl. at ¶ 3. SLX was not engaging in *any* sales and marketing activity in California, and any remaining corporate, call center, accounting, compliance, or human resources functions in California were at the direction of Chesler and other executives in New Jersey as part of the winding down of SLX's marketing and sales operations in California. Beach Decl. at ¶ 6; *see also* Chesler Decl. at ¶ 18-19. As such, the document is irrelevant. Exhibit C to Plaintiff's declaration – SLX requests for bids dated prior to

February 2007 – fares no better. SLX stopped sending out requests for bids from its California office at least a month prior to April 11, 2008, as SLX was in the process of shuttering its marketing and sales operations in California. Beach Decl. at ¶ 7. As such, Exhibit C also is outdated and irrelevant.

Finally, Plaintiff attaches the business cards of persons he claims are SLX "executives" and "corporate officers" located in San Diego, California as Exhibit D to his declaration. Even assuming for sake of argument that the persons cited as executives by Balestri could have once been part of the "nerve center" of SLX, they undoubtedly were not the "nerve center" as of June 2007, let alone April 11, 2008. While some employees in the San Diego office retained executive titles following the executive management change in mid-2007, those employees did not act as decision-makers in the company. Chesler Decl. at ¶ 13; *see also* Beach Decl. at ¶ 3. Rather, they reported to Chesler or others in New Jersey. *Id.* Chesler and others in New Jersey made all major decision regarding the company, including without limitation decisions about pricing, products, market positioning, staffing, and expenditures. *Id.* at ¶¶ 11-13, 18-19. Thus, Plaintiff's declaration and the exhibits thereto do not provide any support for his allegation that SLX's principal place of business was California as of April 11, 2008.

CONCLUSION

For the foregoing reasons, Defendants CIT and SLX have proved complete diversity of citizenship by a preponderance of the evidence. Defendants CIT and SLX therefore respectfully request that the Court deny Plaintiff Fabrizio Balestri's motion to remand.

Dated: July 17, 2008

Respectfully submitted,
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